

No. 83-769

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In the Supreme Court of the United States

OCTOBER TERM, 1983

**JOHN BELMONT AND PHILLIP CHARLES BERNSTENE,
PETITIONERS**

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether transportation of videotape cassettes of pirated motion pictures may form the basis for a charge of interstate transportation of stolen property in violation of 18 U.S.C. 2314.

(I)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B2) is reported at 715 F.2d 459. The memorandum decision of the district court (Pet. App. A1-A19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 1983. The petition for a writ of certiorari was filed on November 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial on a stipulated record in the United States District Court for the Central District of California,¹ petitioners were convicted of conspiring to transport stolen goods in interstate commerce, in violation of 18 U.S.C. 371 and 2314 (Count One), and willfully infringing copyrights of motion pictures, in violation of 17 U.S.C. (1976 ed.) 506(a) (Count Four) (ER 1230-1231).² Each petitioner was sentenced to three years' imprisonment on Count One; those terms were suspended in favor of terms of three months' confinement followed by three years' probation. Petitioners Belmont and Bernstene were fined \$2,500 and \$5,000 respectively and were placed on three-year concurrent terms of probation on Count Four. ER 1230, 1231.³

¹The stipulated record before the district court included the following: Stipulation of Facts as supplemented (ER 1176-1191); transcripts of conversations and meetings between FBI agents and petitioners and their co-conspirators, recorded by the agents; transcripts of court-ordered wiretaps installed at TVX Distributors, which recorded conversations between the conspirators, and FBI summaries of these conversations (ER 1-1135). "ER" refers to the Excerpt of Record filed in the court of appeals.

Petitioners and others were indicted by a federal grand jury sitting in the Southern District of Florida. On the motion of petitioners and co-defendants Russell Hampshire and Walter Gernert under Fed. R. Crim. P. 21(b), venue of their cases was transferred to the Central District of California.

²Pursuant to the stipulation of the parties (Pet. App. A1-A2), the government moved for dismissal of Counts Two, Three, and Five at sentencing, and that motion was granted (ER 1243, Docket No. 136; ER 1249, Docket No. 136). Petitioners do not challenge their convictions on Count Four (see Pet. 6).

³Co-defendants Hampshire and Gernert were convicted on Counts One and Four. Hampshire was fined \$2,500 on Count One and sentenced to two concurrent three-year terms of probation on Counts One and Four (ER 1258). Gernert was fined a total of \$35,000 on Counts One and Four and sentenced to a one-year term of imprisonment on

1. During the summer of 1977, the FBI established in Miami an undercover investigation into the national pornography industry. As part of this investigation, FBI agents Patrick Livingston and Bruce Ellavsky, posing as businessmen operating "Gold Coast Specialties, Inc.," purchased sexually explicit materials from various sources and pretended to distribute it. When the agents discovered in late 1978 that some of the sources were selling pirated motion pictures, as well as pornography, they feigned interest in purchasing such pirated material.

On November 6, 1978, petitioner Bernstene telephoned Livingston in Miami and advised that he and others were operating under the name Discount Distributors and were selling videotape cassettes of X-rated hard core pornographic films, as well as cassettes of major motion pictures (ER 1). In three subsequent recorded telephone conversations, Bernstene discussed with Livingston the possible purchase of videotape cassettes of major motion pictures (ER 3, 14, 28). Bernstene stated that he had at least ten video cassettes of motion pictures and mentioned titles including *Heaven Can Wait*, *Lawrence of Arabia*, *Saturday Night Fever*, and *Gone With The Wind* (ER 5, 7). Bernstene indicated that Al Nunes in Hawaii and co-defendant Bernie Avers were his sources of pirated movies (ER 7, 29, 36, 37-38).

On January 23, 1979, the agents met with petitioner Bernstene and other conspirators at the offices of Discount Distributors, where the agents were shown a copy of *The Enforcer* on a videotape machine (ER 52, 145-148, 190).

Count Four; that term was suspended in favor of ten days' confinement and three years' probation (ER 1251). Co-defendants Timothy Burns, Bernard Avers, Edward Smoliak, and Gary Smoliak pleaded guilty to one count of copyright infringement, in violation of 17 U.S.C. (1976 ed.) 506(a); in addition, the Smoliaks each pleaded guilty to one count of conspiracy to transport videotape cassettes of pirated motion pictures in interstate commerce, in violation of 18 U.S.C. 371 and 2314.

During the meeting, petitioner Bernstene stated that he was still receiving "masters" from Al Nunes as a commission for putting Livingston in contact with Nunes (ER 70-72). In addition, Bernstene said he intended to visit a potential source "in the valley," a collector who had a large library of motion pictures (ER 57-58, 65, 68-69, 70). Co-conspirator Bernard Avers stated that he, too, had provided masters of current motion pictures and could supply others, including *Star Wars*, *Superman*, and several Walt Disney titles (ER 148-149, 166, 176, 182).

On February 6, 1979, Agent Livingston placed an order with petitioner Bernstene for 142 videotape cassettes of 11 motion pictures. They agreed on a total purchase price of \$7,100, and Bernstene directed that the check be made payable to Discount Distributors. ER 204, 220-223. The videotape cassettes filling that order were shipped by Discount Distributors or TVX Distributors in Los Angeles and were received by Gold Coast Specialties over a three-month period (ER 247-248, 258, 294-295, 336-338). The agents later learned that Bernstene was planning to leave Discount Distributors in order to join TVX Distributors (ER 284-285, 287).

On May 31, 1979, Livingston and petitioner Bernstene met in a Marina del Rey hotel room, where Livingston negotiated a second order of 150 cassettes of ten motion pictures, including *China Syndrome*, *Manhattan*, and *Grease* (ER 339-341, 343, 380-383, 385-386). During this meeting, Bernstene stated that someone from a studio was a new source for motion picture masters (ER 350). In two subsequent telephone conversations, Bernstene indicated that he had another operation in Minneapolis that was making duplicates for him and that Livingston would receive some shipments from that source (ER 428, 440, 441-442). On July 17, 1979, Livingston picked up a shipment of 19 videotape cassettes of *The Exorcist* and *Grease*

sent to Gold Coast from Minneapolis Audio. A handwritten note stating "From Chuck Bernstene" was on the packing list in code. ER 488. On September 7, 1979, Bernstene gave Livingston a tour of the TVX Distributors offices, including the "duping" room, which contained 44 machines used for reproducing videotape cassettes (ER 591).

On October 13, 1979, Livingston and Bernstene began negotiating their final transaction. They initially agreed that Livingston would pay \$6,400 in two installments for 120 cassettes. ER 615, 620-621. At an October 29, 1979, meeting in Las Vegas, the order was revised upward to include more cassettes for a total of \$7,500 (ER 713-714, 726, 728). During that meeting, Livingston wrote a check for \$3,750, half of the total cost, and Bernstene delivered to Livingston a package containing 15 cassettes of the movie *The Onion Field* (ER 714, 715, 727, 728).

On January 8, 1980, Livingston finally met petitioner Belmont, whose role in the scheme he had discovered in October 1979, when court-ordered wiretaps first intercepted Belmont's conversations and references to him⁴ (ER 868, 871). When Belmont arrived at the meeting, Bernstene introduced him as his "source" of major motion pictures (ER 871). Belmont stated that he had acquired a good master of the movie *Star Trek* and that he could supply Livingston with cassettes of the movie within a few days. Belmont indicated that he had several "sources" of motion pictures and that one was an individual who delivered movies to theaters in the Los Angeles area. ER 876.

⁴During an October 25, 1979, conversation with co-defendant Gernert, Bernstene stated that the two would have to go over their books of account carefully to determine what Gernert owed Bernstene because co-defendant Hampshire had not been careful about what stock received from "J" (petitioner Belmont) should be credited to Bernstene or to others; Gernert was sure Belmont had been paid in full, but thought he owed Bernstene about \$9,000 (ER 660, 667-671). In a later

On February 14, 1980, Belmont was arrested at his place of business (ER 1118). A search of the premises, pursuant to a warrant, revealed a set-up of 18 recorders connected so that an operator could reproduce simultaneously 16 videotape cassettes from a "master" cassette (ER 1115). Agents seized over 30 video cassette recorders, over 85 cassettes of 50 motion pictures, invoices from TVX Distributors, and three books on copyrights (ER 1119-1133).

2. On appeal, petitioners challenged their convictions on the ground, *inter alia*, that transportation of unauthorized videotape cassettes of copyrighted movies does not constitute an offense under 18 U.S.C. 2314.⁵ Relying on its own prior decision in a similar case of movie piracy, *United States v. Drebin*, 557 F.2d 1316, 1332 (9th Cir. 1977), cert. denied, 436 U.S. 904 (1978), the court of appeals rejected petitioners' contention (Pet. App. B4-B9). The court declined to follow *United States v. Smith*, 686 F.2d 234 (1982), in which the Fifth Circuit refused to apply 18 U.S.C.

telephone conversation, Bernstene confirmed that Belmont supplied him with 15 cassettes of *Grease* (ER 678). On November 2, 1979, Bernstene conferred with Gernert about a dispute that had arisen between Gernert and Belmont over work assignments (ER 746-748), and later that day Gernert said he would make the cassettes of the "Disney things" and that Bernstene should not have "J" do them (ER 751-752). On November 7, 1979, Gernert and Belmont discussed comparing two "master" tapes of *The Muppets* to decide which should be used for making cassettes (ER 785-787). On November 8, 1979, when Belmont called Bernstene's office, he told the receptionist that henceforth he would use the name JoJo as a "precaution" (ER 791-792). During this call, Belmont told Bernstene that he thought Hampshire was the source of the "talking in your place" and that Bernstene should not let Hampshire listen to anything "[b]ecause he is a danger for you" (ER 793).

⁵The court of appeals also rejected petitioner Bernstene's claim that he was entrapped (Pet. App. B9) and the contention of both petitioners that the government had failed to show the absence of a first sale (*ibid.*). These issues are not raised in the petition.

2314 to transportation of videotape cassettes in a case in which the original copying was "off the air" (Pet. App. B6-B7). The court of appeals concluded that the evil at which Section 2314 is aimed is interstate traffic in stolen property and that the "rights of copyright owners in their protected property are just as deserving of protection from interstate transportation as are the ownership interests of those who own other types of property" (Pet. App. B6-B7). The court also concluded that the legislative history of the Copyright Act of 1976, 17 U.S.C. (& 1976 ed.) 101 *et seq.*, and its amendments did not evidence any intent to limit the scope of Section 2314 (Pet. App. B7-B9).⁶ On the contrary, it found evidence in the 1982 amendments supporting the application of Section 2314 to transportation of copies of unauthorized copyrighted material (Pet. App. B8). The court of appeals concluded further that interpretation of the copyright statute as an implied repeal of Section 2314 in a case like this one would violate the "cardinal principle of construction that repeals by implication are not favored" (Pet. App. B8).

ARGUMENT

Petitioners contend (Pet. 6-11) that the court of appeals' holding that transportation of unauthorized videotapes may constitute a violation of 18 U.S.C. 2314 conflicts with the Fifth Circuit's decision in *United States v. Smith*, 686 F.2d 234 (1982). In fact, there is no irreconcilable conflict between *Smith* and this case. Moreover, within the past year this Court denied certiorari in a similar case (which

⁶The Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, 96 Stat. 91 *et seq.*, amended 17 U.S.C. 506(a) and 18 U.S.C. 2318 and added 18 U.S.C. 2319. These amendments, which increased the penalties for willful copyright infringement, did not become effective until May 24, 1982, after the commission of the offenses charged in the indictment. Petitioners were charged and sentenced under the prior version of 17 U.S.C. 506(a).

also arose out of the FBI's Miami-based investigation) raising the same issue. See *Gottesman v. United States*, No. 82-5852 (Feb. 28, 1983).

1. This case involves a significantly different factual situation from that in *Smith*. In *Smith* the defendant had videotaped television programs "off the air" (i.e., from broadcast signals) and had produced and leased multiple copies of the videotaped material. The court held that such conduct did not constitute interstate transportation of stolen property in violation of 18 U.S.C. 2314, since, in the court's view, a copyright could not constitute "goods, wares, [or] merchandise" and copyright infringement could not be regarded as the equivalent of stealing, converting, or taking by fraud within the meaning of the statute (686 F.2d at 241).

Here, in contrast to *Smith*, there was an initial taking of a tangible item (a master tape) from its owner or custodian and a transfer of magnetic information from that tangible item to another (the videotape cassettes shipped to the agents). Early in the scheme, petitioner Bernstene told Agent Livingston that Al Nunes and co-defendant Avers were his sources of pirated movies (ER 7, 29, 31, 37-38). At the January 23 meeting, Bernstene stated that he was still receiving movie "masters" from Nunes, but was also investigating a potential source "in the valley," a collector who had a large library of motion pictures (ER 57-58, 65, 68-69, 70-72). At the end of May, petitioner Bernstene told one of the agents that his new source for motion picture masters was someone from a movie studio (ER 350). When Agent Livingston met petitioner Belmont, petitioner Bernstene introduced him as his "source" of major motion pictures (ER 871). Belmont admitted that he had several sources of motion picture masters, one of whom delivered movies to theaters in the Los Angeles area (ER 876). A search of Belmont's business revealed recorders capable of making

multiple cassettes from master tapes (ER 1115). This evidence clearly indicates that the pirated cassettes were made from master tapes, rather than recorded "off the air." The court in *Smith* acknowledged that such a situation would be distinguishable from the case before it. See 686 F.2d at 243-244 n.17. Thus, whatever the merits of *Smith*,⁸ there is no irreconcilable conflict between *Smith* and the present case.

Even if there were a conflict between *Smith* and this case on the issue of the application of 18 U.S.C. 2314 to copyright infringing activity, that conflict would be of considerably diminished significance as a result of the passage of the Piracy and Counterfeiting Amendments Act of 1982, Pub. L. No. 97-180, 96 Stat. 91 *et seq.*, codified at 17 U.S.C. 506(a) and 18 U.S.C. 2318, 2319. The new statute provides for felony treatment for more serious cases of copyright infringement involving audiovisual materials and trafficking in counterfeit labels, while prior law provided only for

⁷The court of appeals' statement that the copying in this case was "off the air" (Pet. App. B6) appears to be without foundation in the record and may reflect some misunderstanding of that term. Petitioners did not contend in their brief to the court of appeals that *Smith* governed because they had taped the cassettes "off the air." The bald statement of petitioners' counsel on rebuttal at oral argument before the court of appeals was the first time petitioners claimed that their source of copyrighted materials was a broadcast signal, rather than movie masters misappropriated from a lawful owner or custodian.

⁸The court in *Smith* rejected or distinguished a number of cases in which federal courts have concluded that unauthorized taking of various forms of intangible property could form the basis for a violation of 18 U.S.C. 2314. See, e.g., *United States v. Berkwitt*, 619 F.2d 649 (7th Cir. 1980); *United States v. Whetzel*, 589 F.2d 707 (D.C. Cir. 1978); *United States v. Atherton*, 561 F.2d 747 (9th Cir. 1977); *United States v. Drebin*, 557 F.2d 1316 (9th Cir. 1977), cert. denied, 436 U.S. 904 (1978); *United States v. Sam Goody, Inc.*, 506 F. Supp. 380 (E.D.N.Y. 1981). Moreover, the court in *Smith* rested its analysis on definitions of the statutory terms that appear to be unduly narrow. However, these points need not be considered here, because, as noted in the text, *Smith* is clearly distinguishable from the case at hand on its facts.

misdemeanor treatment for first offenses under the copyright infringement statutes. In view of the increased penalties provided under the new statute, prosecutors are likely to have less occasion to invoke 18 U.S.C. 2314 in connection with copyright infringing activity.

2. To the extent petitioners may contend that their conduct is outside the reach of Section 2314 because the essential magnetic signals constituting a movie are transferred from one tangible item (the master tape) to a different tangible item (the videotape cassettes), that contention is incorrect. In *United States v. Bottone*, 365 F.2d 389 (2d Cir.), cert. denied, 385 U.S. 974 (1966), the court considered a case in which documents had been removed from a company's files, copied, and returned to the files. Judge Friendly, writing for the court, rejected the argument that interstate transportation of the copies would not constitute a violation of 18 U.S.C. 2314 on the theory that the copies would not be "goods" that were "stolen, converted or taken by fraud." He stated that "when the physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers into a tangible object never possessed by the original owner should be deemed immaterial" (365 F.2d at 393-394). Likewise, in the present case, the transfer of magnetic signals from one tape to another does not remove petitioners' actions from the scope of the statute.

Nor do the 1982 Piracy and Counterfeiting Amendments indicate that activities involving copyright infringement may be prosecuted only under the copyright laws. Those amendments provide expressly that the penalties for copyright infringement "shall be in addition to any other provisions of title 17 or any other law." 18 U.S.C. 2319(a). That provision makes clear that the 1982 amendments did not implicitly repeal Section 2314 as it is applied to the interstate transportation of pirated movies. See also, e.g., *United*

States v. Batchelder, 442 U.S. 114, 122 (1979) (legislative intent to repeal must be manifest in positive repugnancy between provisions).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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